STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 267081 Wayne Circuit Court
D'ANDRE LANE, Defendant-Appellant.	LC No. 03-009510-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of possession of at least 25 grams but less than 50 grams of cocaine, MCL 333.7403(2)(a)(*iv*), one count of possession of at least 25 grams but less than 50 grams of heroin, MCL 333.7403(2)(a)(*iv*), one count of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Pursuant to MCL 769.10, defendant was sentenced as a second habitual offender to concurrent terms of 2 to 6 years' imprisonment for the cocaine conviction, 2 to 6 years' imprisonment for the heroin conviction, and 2 to 7 years' imprisonment for the felon-in-possession conviction. Defendant was also sentenced to a mandatory consecutive term of two years in prison for the felony-firearm conviction. Defendant now appeals as of right. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

Defendant first argues that there was insufficient evidence to support his felon-in-possession and felony-firearm convictions. We disagree.

When reviewing a claim of insufficient evidence, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To prove the offense of felon-in-possession, the prosecution must establish that a defendant, who has been convicted of a specified felony, possessed a firearm. MCL 750.224f; *People v Tice*, 220 Mich App 47, 53-54; 558 NW2d 245 (1996). Possession of a firearm may be actual or constructive and may also be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A defendant has constructive possession of a firearm if its location is known and the firearm is reasonably accessible to him or

her. *Burgenmeyer*, *supra* at 438; see also *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989).

The parties stipulated that defendant was previously convicted of a felony and was ineligible to carry a firearm at the time of the incident. With regard to the possession element, the evidence strongly suggested that defendant constructively possessed the firearm found under the bed. Trial testimony revealed that when officers entered the suspected drug house to execute a warrant, they found defendant standing naked in the living room. Upon seeing the officers, defendant ran away into another part of the house. The officers gave chase and eventually caught up with defendant in a bedroom, where defendant was found on a bed, throwing a bag of drugs out of the window. A search of the bedroom revealed a gun and more drugs under the bed, and $467 in cash on a chair. Defendant admitted to an officer that he lived at the house in question, and also at another residence. Given that (1) the gun was found underneath the bed that defendant was sitting on when he was arrested, (2) defendant admitted to living in the house in question, (3) the drugs found underneath the bed next to the gun were of the same type and packaged in the same way as the drugs defendant threw out of the window, and (4) defendant was found to have possessed the drugs he threw out of the window and the drugs found under the bed, a rational jury could have found that defendant constructively possessed the gun underneath the bed for purposes of the felon-in-possession charge.

To prove the offense of felony-firearm, the prosecutor must establish: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Constructive possession of a firearm is proved if the firearm is known to the person and is reasonably accessible to him. *Burgenmeyer*, *supra* at 438.

The discovery of a firearm underneath the bed upon which defendant was arrested, combined with defendant's admission that he lived in the house in question and his stipulation that he was ineligible to possess a firearm at the time of the incident, led to a finding that defendant was guilty of felon-in-possession. It is reasonable to conclude that during the course of committing the offense of felon-in-possession, defendant "possessed" the firearm for purposes of the felony-firearm charge as well. Indeed, the offense of felon-in-possession is itself a felony, and can serve as the underlying felony for a felony-firearm conviction. *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Hence, a rational trier of fact could have found that the elements of felony-firearm were proven beyond a reasonable doubt.

Second, defendant argues that the trial court erred by failing to instruct the jury concerning an essential element of his two drug possession charges, and that this error requires reversal of his possession convictions. We agree.

Generally, we review claims of instructional error de novo. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). However, defendant failed to object to the trial court's jury instruction below. Accordingly, we review defendant's unpreserved claim of instructional error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected his substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* at 763.

"[O]ur Supreme Court has held that it is 'error for the trial court to give an erroneous or misleading jury instruction on an essential element of the offense.'" *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000), quoting *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). An instruction that wholly omits an element of the charged offense is error of constitutional magnitude. *Carines, supra* at 761; *People v Fennell*, 260 Mich App 261, 277; 677 NW2d 66 (2004). A jury instruction may constitute plain error when it "t[akes] an essential element of the offense away from the jury's determination." *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

The trial court instructed the jury that in order to find defendant guilty of possession of more than 25 grams but less than 50 grams of cocaine and heroin, MCL 333.7403(2)(a)(*iv*), it was only required to find beyond a reasonable doubt that defendant possessed quantities of cocaine and heroin in amounts less than 50 grams. The jury was never instructed that it was required to find beyond a reasonable doubt that defendant possessed quantities of cocaine and heroin in amounts of at least 25 grams. Nonetheless, the jury convicted defendant of possession of at least 25 grams but less than 50 grams of cocaine and heroin. MCL 333.7403(2)(a)(*iv*). Because the trial court omitted mention of an essential element of the possession offenses, the jury instruction in this regard constituted plain error. *Knapp*, *supra* at 375. It remains to be determined, however, whether this plain error actually prejudiced defendant's substantial rights. See *Carines*, *supra* at 762-763.

The evidence concerning the quantities of cocaine and heroin in defendant's possession was unclear. Only a portion of the cocaine and heroin was weighed in this case. The samples of cocaine and heroin that were actually weighed by the police each weighed significantly less than 25 grams. Although the parties stipulated to the weights of these two respective samples, the parties never agreed concerning the total weight of the cocaine and heroin that was found by the police. Nor were the full quantities of cocaine and heroin ever weighed in their entireties. At oral argument before this Court, the prosecutor was unable to provide the total weights of the heroin and cocaine, and she admitted that she did not even know for certain whether the quantities of cocaine and heroin found in defendant's possession weighed more than or less than 25 grams.

In light of the uncertain nature of the evidence presented on this issue, no rational jury could have concluded beyond a reasonable doubt that defendant possessed more than 25 grams of cocaine and more than 25 grams of heroin.[1] However, because the jury was never instructed that it was required to find that the quantities of cocaine and heroin exceeded 25 grams, it was necessarily unaware that it should consider whether the drug quantities weighed more or less than 25 grams. In fact, the trial court's instructions suggested that so long as the quantities of cocaine and heroin each weighed less than 50 grams, the jury should convict defendant of two counts of possession of more than 25 grams but less than 50 grams of a controlled substance. We conclude that the plainly erroneous jury instruction in this case indeed affected defendant's substantial rights by exposing him to the possibility of a conviction for which the evidence at trial was legally insufficient. Because defendant has shown plain instructional error that

[1] We note that defendant has not raised a claim of insufficient evidence on appeal.

prejudiced his substantial rights and undermined the fairness of his trial, we vacate defendant's convictions of possession of more than 25 grams but less than 50 grams of cocaine and heroin, MCL 333.7403(2)(a)(*iv*).

Although the jury improperly convicted defendant of possession of more than 25 grams but less than 50 grams of cocaine and heroin, MCL 333.7403(2)(a)(*iv*), the jury necessarily found beyond a reasonable doubt that defendant possessed *at least some* cocaine and heroin. "[A] jury's verdict regarding a necessarily included lesser offense always is encompassed in the verdict on the greater offense." *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001). Thus, when a conviction for a greater offense is reversed on grounds that affect only the greater offense, an appellate court may remand for entry of judgment of conviction on a necessarily included lesser offense. *Id*., citing *Rutledge v United States*, 517 US 292, 306; 116 S Ct 1241; 134 L Ed 2d 419 (1996). Possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(*v*), is a necessarily included lesser offense of possession of more than 25 grams but less than 50 grams of a controlled substance, MCL 333.7403(2)(a)(*iv*). See *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002). Thus, the jury's verdicts *ipso facto* encompassed the lesser included offenses of possession of less than 25 grams of cocaine and heroin, MCL 333.7403(2)(a)(*v*). *Bearss*, *supra* at 631.

We remand for entry of conviction on the lesser offenses of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*). We recognize that the maximum statutory penalty for possession of more than 25 grams but less than 50 grams of a controlled substance, MCL 333.7403(2)(a)(*iv*), is the same as the maximum statutory penalty for possession of less than 25 grams of cocaine and heroin, MCL 333.7403(2)(a)(*v*). However, because defendant's guideline scoring and minimum sentence may be affected by our decision, we direct the trial court on remand to resentence defendant on the two possession convictions.

We affirm defendant's felon-in-possession and felony-firearm convictions and sentences. We vacate defendant's possession convictions and remand for entry of conviction and resentencing on the lesser included offenses of possession of less than 25 grams of cocaine and heroin, MCL 333.7403(2)(a)(*v*).

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra